

THE AMERICAN LAW INSTITUTE AND THE RESTATEMENT (THIRD) OF TORTS: PRESENTATION OF MICHAEL GREEN

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PROFESSOR MICHAEL GREEN:

Good morning. First of all, let me say thank you to Southwestern Law School. Thank you to the Law Review for all your hard work in getting this symposium together and continuing to work on producing the Law Review issue that you will publish following this symposium. Thank you as well to my good friends Chris Robinette and Byron Stier—for conceiving the wonderful topic for today and for your hard work in putting this event together. Imagine having a day to talk about torts! I mean, this is what heaven is like, I am pretty sure. I came with great excitement, and I could not wait to dive in. Then, I became even happier because I saw the poster you prepared to announce this symposium. It says: “Concluding the Restatement (Third) of Torts, Friday March 24.” So, Nirvana is where I will be at the end of the day when the Third Restatement of Torts is concluded—several years, I will add, before I expected all the work necessary for its conclusion would have been done. We better get to work; we have a lot of restating to accomplish before the end of the day.

My assignment is to explain how the Restatement titled Miscellaneous Provisions, which we will talk about today, came to be. Have you all learned about Miscellaneous Provisions in your torts class? That is in your casebook, right? No, it is not. So, instead of the tedium of hearing about the history of this Restatement, I thought we might have a little fun this morning. We are in a law school. How about a pop quiz? Hmm, I do not see a lot of excitement among the students in the audience in response to this proposal—about the same as when I try the same proposal on the students in my class. Heck, this is not for a grade, so let us go: How many

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people in this room were born before 1992? How many were born before 1892? [only Green raised his hand]. Here is the question: Tell me the significant events that occurred in 1992. What headlines got above the fold in the *New York Times* in 1992? [No response from the audience]. Nobody knows? You all fail. How about Bill Clinton elected president?¹ That happened in 1992. How about DNA fingerprinting being invented?² 1992. Has anybody ever been to the Mall of America? 1992 is the year it opened. Whitney Houston set a record fourteen weeks at number one on *Billboard* with her song, *I Will Always Love You*,³ and Disney released the movie *Aladdin*,⁴ all in 1992.

Those were big events, but the number one event was that the American Law Institute (ALI) began work on the Restatement (Third) of Torts.⁵ Geoff Hazard, the director of the ALI at the time, convened two meetings in Philadelphia of torts people to brainstorm about how to construct the Restatement (Third) of Torts.⁶ In the past, back in 1923 when the work of preparing Restatements began, the way it was done was that a topic was selected—torts, for example—and then a Reporter was appointed to do the subject. Frances Bohlen was commissioned to do the first Restatement Torts.⁷ Arthur Corbin, a contracts god at the time, was the Reporter for contracts,⁸ and that was the way Restatements were done through the Restatement (Second). William Prosser was the Reporter who did the Restatement (Second) of Torts.⁹

A funny thing happened to that pattern when the ALI began work on the Restatement (Third) of Torts. Instead of designating a Reporter to revise the 900 sections in the first two Restatements, the decision was made

1. Russell L. Riley, *Bill Clinton: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/clinton/campaigns-and-elections> [https://perma.cc/DS3T-ZNSF].

2. See generally Rana Saad, *Discovery, Development, and Current Applications of DNA Identity Testing*, 18(2) PROC. (BAYL UNIV. MED. CTR.) 130 (2005).

3. Whitney Houston's 'I Will Always Love You' Topped Billboard Hot 100 In 1992, WHITEY HOUSTON (Nov. 28, 2023), <https://www.whitneyhouston.com/news/whitney-houstons-i-will-always-love-you-topped-billboard-hot-100-in-1992/> [https://perma.cc/6ZQ2-W9W8].

4. ALADDIN (Walt Disney Pictures 1992).

5. Op-ed, *ALI Oversteps with Expansive Restatement of Contract Law*, LAW360 (May 13, 2022), <https://www.law360.com/articles/1492905/ali-oversteps-with-expansive-restatement-of-contract-law> [https://perma.cc/8SBZ-FUUY].

6. See generally Stephen D. Sugarman, *Review of Cases and Materials on Torts by William L. Prosser*, 30 UNIV. CHI. L. REV. 416 (1963).

7. See generally L.H. Elredge, *Francis Hermann Bohlen*, PEN. CAREY L.: LEGAL SCHOLARSHIP REPOSITORY 387 (1943).

8. See generally Joseph M. Perillo, *Review: A Restatement of Torts*, 44 STANFORD L. REV. 1163 (1992).

9. See generally J.W. Wade, *Review of Cases and Materials on Torts by William L. Prosser*, 30 UNIV. CHI. L. REV. 416 (1963).

to proceed with dedicated subject-matter projects, rather than serially through all the subjects of torts. The first subject matter was products liability. Section 402A—you probably learned about that in law school unless you were born before 1892—it has been the most cited and the most influential of all of what the ALI has done. It ushered in strict products liability, a little bit of which is still around, and the ALI thought: Well, this is thirty years old now; we should see what has happened in the last thirty years. So, a Restatement (Third) of Torts: Products Liability was commissioned, reflecting one of the most major developments in tort law in the twentieth century. There was another major development toward the end of the twentieth century in tort law, and that was the rejection of contributory negligence and the adoption of comparative fault and comparative contribution. Suddenly, tort law and common law judges realized it does not have to be all or nothing. Indeed, if we have 100 items (or percentages of comparative fault), we can split them up in a lot of different ways, which led to the introduction of comparative fault. So, the ALI said, the Restatement (Second) says contributory negligence: if plaintiff is at fault, you do not recover; we need to get on track with this new method of apportioning liability when both plaintiff and defendant are at fault. So, another major development resulted in the Apportionment of Liability Restatement, the second project.¹⁰ Then, someone in the ALI said, Eureka! There are some basic principles of tort law, and we might want to do something about them: duty, negligence, intent, recklessness, and causation. So, a third project began, named at its conclusion the Restatement (Third) of Torts: Liability for Physical and Emotional Harm.¹¹

In 2007, The ALI convened a meeting of stakeholders regarding the architecture of the Third Restatement. It was in Austin, Texas, at the University of Texas and focused on the future of the Restatement (Third) of Torts. What do we need to do? Were you there, Ken [addressing Ken Simons]? Where are we going? We had proceeded willy-nilly up to that point. There had been no intelligent design guiding the construction toward a final product. What is the game plan? The most important aspect that emerged from that meeting was a commitment that the ALI would restate all of torts in the Restatement (Third) of Torts and not rely on bringing forward provisions that were in the Restatement (Second) of Torts unless careful consideration determined that should be done and then, by incorporation into the Third Restatement. In other words, when the Third

10. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (AM. L. INST., 2000).

11. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. L. INST. 2010 & 2012).

Restatement was completed, it would supersede entirely the Second Restatement.

Previously, there had been some thought about intentional torts. Well, there has not been much going on in intentional torts over the past fifty years—do we really need to restate the subject? We can just stay with what is in the Restatement (Second). The decision at the Austin meeting was that we would not do that. We will restate everything that resulted in an intentional torts restatement. I think the most difficult one—we have one of the Reporters here, Ken Simons, and I think you had maybe the most difficult project because there is so little new case law in the intentional torts field. They struggled with the absence of case law. You can struggle because there is too much case law, but you guys really had a difficult task, and that work is about to come to published fruition. Ken and his co-reporter Jonathan Cardi have done a fantastic job putting together a difficult and unruly area of law.

There was a Restatement about fraud and misrepresentation and other torts that cause economic harm rather than physical harm that was commissioned—dragged on a bit with a change in the Reporter and finished around the same time the Intentional Torts Restatement finished, in terms of getting final approval. There are property torts—nuisance, trespass, conversion—that you may have learned about in your torts class (or maybe in your property law class). They really do straddle property and tort law, protecting interests in property and employing tort structure and principles to do that. The ALI has subcontracted that effort to the Restatement (Fourth) of Property Law Reporters. They are doing that, but that will be parallel published as a piece of the Restatement (Third) of Torts.

Five years ago, Ricky Revesz, then director of the ALI,¹² had this gleam in his eye. It was for the completion of the Restatement (Third) of Torts, which at that point had been going on for about twenty-five years, and he asked me and Bill Powers, with whom I had worked on earlier Restatements, to assess what the ALI needed to do to complete the Third Restatement of Torts. Bill and I got together, and we looked, and it was easy to say, well, you have to do defamation and privacy. That had not been done, but that is an important aspect of torts, and you need to do remedies to address damages and the occasional injunction. Remedies is an incredibly complicated and interesting subject, but we have got to do that. So those were obvious, but then a funny thing happened as Bill and I looked at it, and we realized that in the Restatement (Second), there were

12. See *ALI Members, Director Emeritus, Life Member: Richard L. Revesz*, AM. L. INST., <https://www.ali.org/members/member/100047/> [<https://perma.cc/55RY-9LZQ>].

all these orphans remaining—or doctrines that had not been covered in any of the Third Restatement projects. There was not a great deal, and there was no connecting thread among them, but they were in the Restatement (Second) and required restating pursuant to the 2007 Austin agreement. So, Bill and I cataloged those. We also looked at the fact that since the Restatement (Second) was completed in 1979, there has been a lot of interesting torts stuff that has developed, and not only that, but there are major areas of tort law that should have been in prior torts Restatements, but they were not. Can you imagine a torts Restatement that does not have medical malpractice in it? Well, the first two did not. Can you imagine a Restatement of Torts that does not have vicarious liability? Well, the first two did not. And those really are so central to tort law. How could we ignore them? So, what Bill and I said to Ricky was that we needed yet another Restatement project to catch orphans—new developments and subjects previously ignored—and that was what this project was initially called, “Concluding Provisions,” commissioned by the ALI, that has since been renamed “Miscellaneous Provisions.”

And I want to conclude by saying that one of the great aspects of my career has been the opportunity to work with two co-reporters who are some of the most extraordinary people I have been privileged to know. One is not here with us, Bill Powers and the other is the woman I am about to introduce to you, Professor Nora Freeman Engstrom.